

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

WESLEY D. FREE,)
vs.)
Plaintiff,)
vs.)
OKLAHOMA DEPARTMENT OF)
CORRECTIONS, et al.,)
Defendants.)
Case No. CIV-12-329-F

REPORT AND RECOMMENDATION

Plaintiff, a prisoner appearing *pro se*, has filed a motion for leave to proceed *in forma pauperis* and supporting affidavit. This matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B) and (C). Having reviewed said motion, the undersigned finds that Plaintiff has sufficient funds to prepay the filing fee of \$350.00. Because Plaintiff does not qualify for authorization to proceed without prepayment of the filing fee, it is recommended that Plaintiff's motion [Doc. No. 2] be denied and that he be ordered to prepay the full \$350.00 filing fee for this action to proceed. 28 U.S.C. § 1915(a)(1). It is further recommended that this action be dismissed without prejudice to refiling unless Plaintiff pays the \$350.00 filing fee in full to the Clerk of the Court within twenty (20) days of any order adopting this Report and Recommendation.

However, the Plaintiff is advised that even if he pays the \$350.00 filing fee, the undersigned will recommend that the case be **transferred** to the U.S. District Court for the

Eastern District of Oklahoma as the undersigned finds, for the reasons stated below, that venue is proper in that court.

The only Defendant named in the complaint is Physician's Assistant Jimmy Williams, who is identified as a resident of Atoka, Oklahoma and is apparently an employee of the Howard McLeod Correctional Center in Atoka, Oklahoma, located in the Eastern District of Oklahoma. 28 U.S.C. §116(b). Where an action is filed in the incorrect venue, 28 U.S.C. § 1406(a) provides that the Court may "dismiss [the case], or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *See also Coleman v. Crisp*, 444 F. Supp. 31, 33 (when "no reason appears why it would be more in the interest of justice for the court to transfer the case than to dismiss it, it should be dismissed.").

Therefore, in lieu of paying the \$350 filing fee, Plaintiff may choose to dismiss this action and refile in the United States District Court for the Eastern District of Oklahoma.

Plaintiff is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by April 18, 2012, in accordance with 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. Plaintiff is further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F. 2d 656 (10th Cir. 1991).

ENTERED this 29th day of March, 2012.



BANA ROBERTS

UNITED STATES MAGISTRATE JUDGE